

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

February 25, 2011

Jeanne Y. Sisk  
19796 Sea Air Avenue  
Rehoboth Beach, DE 19971

Richard E. Berl, Jr., Esquire  
Smith Feinberg McCartney & Berl, LLP  
406 South Bedford Street  
P.O. Box 588  
Georgetown, DE 19947

**RE: Jeanne Y. Sisk v. Sussex County Board of Adjustment  
C.A. No. S09A-12-004 ESB  
Letter Opinion**

Date Submitted: October 15, 2010

Dear Ms. Sisk and Mr. Berl:

This is my decision on Jeanne Y. Sisk's appeal of the Sussex County Board of Adjustment's denial of (1) her appeal of a Sussex County building official's decision to issue her a violation notice for the shed located on her lot, and (2) her application for a variance for her shed from the building setback and separation requirements for structures in a mobile home park. Sisk placed a shed on her lot without obtaining a building permit and in violation of the building setback and separation requirements for structures in a mobile home park. A Sussex County building official issued a violation notice to Sisk and gave her 30 days to correct the violations. Sisk then filed an appeal of the building official's decision and an application for a variance with the Board. The Board denied her appeal because she filed it too late and her application for a variance because the Board could not make an informed decision on it without a survey showing the location of the shed and her mobile home and the building setback and separation lines. I have affirmed the Board's

decisions because they are in accordance with the applicable laws regarding the deadline for filing an appeal of a building official's decision and the requirements for obtaining a variance.

### **STATEMENT OF FACTS**

Sisk leases lot number A-16 in Sea Air Mobile City, a mobile home park located near Rehoboth Beach, Delaware. She has lived in Sea Air for nearly 40 years. Sisk's stepfather put an 8' x 10' shed on a concrete pad behind her mobile home in the rear corner of her lot in 1969. Her daughter replaced the first shed with an 8' x 10' shed in the 1990s. Sisk replaced the second shed with an 8' x 10' shed in 2008. She never obtained a building permit or Sea Air's approval for any of the sheds. A Sussex County building official issued a violation notice to Sisk on January 28, 2009. The violation notice informed Sisk that she was in violation of the rear-yard and side-yard setback requirements, the separation requirements for structures in a mobile home park, and the requirement to get a building permit for the shed.<sup>1</sup> The violation notice instructed Sisk to either bring the shed into compliance or file an application for a variance from the building setback and separation requirements with the Board. The violation notice also instructed Sisk to obtain Sea Air's approval for the shed and a survey showing the location of the shed on her lot if she wanted to submit an application for a variance to the Board. The violation notice also instructed Sisk to correct the violations by February 6, 2009. The requirement for Sisk to obtain Sea Air's approval for the shed and a survey showing the location of the shed on

---

<sup>1</sup> Sussex Cty. C. § 115 - 224(A) and § 115 - 172 (G)(7). The current side-yard and rear-yard setbacks are each 10 feet. They are five feet for mobile home parks developed prior to the adoption of the zoning code. The building separation requirement prohibits an accessory structure from being closer than 20 feet to the main residential structure.

her lot related to an agreement between Sussex County and Sea Air regarding a process for handling improvements on a tenant's lot in the mobile home park that was entered into on May 30, 2007. Sea Air is an old mobile home park that was developed before the adoption of the current zoning code, resulting in many of the structures in the mobile home park being in violation of the current zoning code. This led Sussex County to place a moratorium on applications for building and placement permits for Sea Air in 2007. Sussex County did this because it was difficult to determine if a proposed structure violated the building setback requirements or the limits on the size of a structure relative to the size of the lot that the structure was to be placed on because there was no survey of the lots in Sea Air. Sussex County and Sea Air resolved this problem by allowing Sea Air to take a current aerial photograph of the mobile home park and place it over a survey that Sea Air had obtained in 1982. This allowed Sea Air and Sussex County to get a reasonable idea of the location of the improvements in the mobile home park relative to the individual lot lines. Sussex County agreed to treat the existing structures in Sea Air as non-conforming structures and not issue any zoning violations for them. However, the agreement provided that any replacement or new structures would be subject to the current zoning code. This would allow the mobile home park to come into compliance with the current zoning code over time. Thus, if a tenant wanted to place a new structure on the tenant's lot, or replace an existing structure, the tenant would have to obtain Sea Air's prior written approval. The tenant would also have to obtain a survey showing the proposed location of the new or replacement structure. Once the tenant did this, the tenant would, if necessary, submit an application for a variance to the Board, together with the survey, for the necessary approvals. This process allowed Sussex County and Sea Air to move forward and address

only those issues that arose after the agreement was reached.

Sisk did not follow this procedure. She just put the shed on her lot and did not do anything until she got the violation notice. Sisk did eventually ask Sea Air to approve what she had already done. Her problem with the shed eventually caught the attention of David B. Baker, the Sussex County Administrator, prompting him to send a memorandum to Sussex County Councilman George B. Cole, outlining what he thought were Sisk's options for resolving her problem with the shed. The memorandum was dated May 27, 2009. The options included bringing the shed into compliance with the zoning code, moving the shed, or obtaining a variance from the building setback and separation requirements. When Sisk did not correct the violation or file an application for a variance, Sussex County filed a lawsuit against her in the Court of Chancery on June 9, 2009. The lawsuit sought an order from the Court of Chancery forcing Sisk to remove the shed from her lot.

Sisk then filed an appeal of the Building official's decision to issue her a violation notice and an application for a variance with the Board on June 25, 2009. The Board originally refused to accept Sisk's appeal and application for a variance because she did not file the appeal in time and did not include a survey with her application for a variance. Richard E. Berl, Jr., the attorney for the Board, had concluded that Sisk's original appeal was untimely. Hal Godwin, the assistant administrator for Sussex County, had concluded that Sisk's original application for a variance was incomplete because it did not include a survey. However, despite the positions taken by Berl and Goodwin, the Board relented and accepted Sisk's amended appeal and application for a variance on July 29, 2010. Sisk sought to appeal (a) the Sussex County building official's decision to issue her a violation notice for her shed, (b) the decisions in Baker's memorandum, (c) the property assessment

card for lot A-16, (d) the decisions made by Berl and Godwin rejecting her appeal because it was untimely and her application for a variance because it did not include a survey, and (e) Sussex County's decision to file an action in the Court of Chancery seeking the forced removal of the shed. Sisk, as part of her combined filing with the Board, also alleged that the "rules, conditions and restrictions" that Sussex County placed on her application for a variance were excessive, arbitrary and capricious, and unreasonably interfered with her right to seek timely redress. She also alleged that Sussex County failed to properly inform her of her right to appeal the building official's decisions and misinformed her of her appeal rights. Sisk also alleged that she did not need a variance, but asked for one without specifying the dimensions of the variance.

The Board held a hearing on October 5, 2009. Sisk testified about the history of the three sheds on her lot, her belief that her new shed should be "grandfathered" and treated as a non-conforming structure, and the unfairness of requiring her to submit a survey in order to obtain a variance. Cindy Surface, the manager of Sea Air, testified about the process for obtaining Sea Air's approval of a new or replacement structure and Sisk's failure to follow it. Lawrence B. Lank, the Director of Planning and Zoning for Sussex County, testified about the zoning code and the long-standing requirement to get a building permit for a shed. A number of residents of Sea Air also testified. The Board denied Sisk's appeal of the various decisions because it was not filed in time. The Board rejected Sisk's application for a variance because without a survey the Board could not make an informed decision about her application for a variance.

### **STANDARD OF REVIEW**

The standard of review on an appeal from a decision made by a Board of

Adjustment is limited to the correction of errors of law and a determination of whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law.<sup>2</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>3</sup> If the Board's decision is supported by substantial evidence, a reviewing court must sustain the Board's decision even if such court would have decided the case differently if it had come before it in the first instance.<sup>4</sup> The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable.<sup>5</sup> In the absence of substantial evidence, the Superior Court may not remand the Board's decision for further proceedings, but rather, may only "reverse or affirm, wholly or partly, or may modify the decision brought up for review."<sup>6</sup>

### **DISCUSSION**

Sisk argues on appeal that the Board denied her appeal and application for a variance "based on narrow-minded and unduly bureaucratic technicalities" and that it never considered the merits of her case. She also argues that her appeal was filed in time and that if it was not filed in time it was because she was misinformed by Sussex County

---

<sup>2</sup> *Janaman v. New Castle County Board of Adjustment*, 364 A.2d 1241, 1242 (Del.Super. 1976).

<sup>3</sup> *Miller v. Board of Adjustment of Dewey Beach*, 1994 WL 89022, \*2 (Del.Super. Feb. 16, 1994).

<sup>4</sup> *Mellow v. Board of Adjustment of New Castle County*, 565 A.2d 947, 954 (Del.Super. 1988), *aff'd*, 567 A.2d 422 (Del. 1989).

<sup>5</sup> *Mellow*, 565 A.2d at 956.

<sup>6</sup> 22 *Del.C.* §328(c).

personnel as to her appeal rights. Lastly, Sisk argues that State law does not require a person to submit a survey with an application for a variance and that the requirement to do so is unnecessary and burdensome. I will address each of Sisk's arguments as they relate to the Board's decisions.

### **I. The Appeal of the Violation Notice**

The process for taking an appeal of a building official's decision is set forth in Sussex County Code § 115-208(B). This section states that "[a]n appeal to the Board may be taken by any person aggrieved or by any officer, department, board or bureau of the county affected by any decision of the Director. Such appeal shall be taken within 30 days after the decision appealed from by filing with the Director a notice of appeal, specifying the grounds thereof."

#### **A. The Violation Notice**

The Board found that Sisk did not file her appeal of the building official's decision to issue her a violation notice in time. Section 115-208(B) requires an appeal of a building official's decision to be filed with the Board within 30 days after the decision is made. The building official issued the violation notice to Sisk on January 28, 2009. Therefore, the last day for Sisk to timely file an appeal with the Board was on February 27, 2009. Sisk filed her appeal with the Board on June 25, 2009. This is more than 30 days after the date of violation notice. Thus, the Board's decision that Sisk did not file her appeal in time is in accordance with the law regarding the deadline for filing an appeal of a building official's decision.

Sisk argues that her appeal was not filed in time because she was not told that she

had the right to file an appeal and was misinformed by a Sussex County employee about her right to appeal. She did not learn that she had the right to file an appeal with the Board until after she read Baker's memorandum, which was, given the date of the memorandum, sometime after May 27, 2009. Sisk, in her testimony before the Board, was vague about what she was allegedly told by the unidentified Sussex County employee regarding her right to file an appeal. The violation notice did not tell Sisk that she had the right to file an appeal of the building official's decision within 30 days of the building official making the decision. However, none of this matters. The right to file an appeal of a building official's decision with the Board and the time limit for doing so are set forth in the Sussex County Code. Therefore, this information was available to Sisk. It is not Sussex County's responsibility to inform Sisk of her legal rights and remedies.<sup>7</sup>

## **B. The Baker Memorandum**

The Board found that Baker's memorandum is not a decision within the meaning of Section 115-208(B) that can be appealed to the Board. Section 115-208(B) provides that a person aggrieved by a decision made by a county official regarding the application of the zoning law may file an appeal with the Board. Decision is defined as "a judicial or agency determination after consideration of the facts and the law."<sup>8</sup> The Baker memorandum does nothing more than set forth the background of Sisk's case and, in Baker's opinion, outline Sisk's options for resolving it. Baker does not make a "judicial" or "agency" determination about whether Sisk's shed was in violation of the zoning code. As such, Baker's

---

<sup>7</sup> "Ignorance of the law will not form the basis for relief from judgment." *Brannon v. LaMaina*, 659 A.2d 227, 1994 WL 679719, at \*1 (Del. Nov. 28, 1994)(Table).

<sup>8</sup> Black's Law Dictionary 467 (9<sup>th</sup> ed. 2009).

memorandum is not a decision that may be appealed to the Board. Moreover, the “reversal” of the options identified in Baker’s memorandum by the Board or this Court would not change anything because Sisk would still be left with the violations of the zoning code that were set forth in the violation notice.

### **C. The Property Assessment Record for Lot A-16**

The Board found that the information in the property assessment record for lot A-16 is not a decision within the meaning of Section 115-208(B) that can be appealed to the Board. This matter is irrelevant because it has nothing to do with Sisk’s shed. Sisk’s family leased both lots A-16 and A-18. Sussex County maintains a system of index “cards” for all of the properties in Sussex County. The cards are used for tax purposes and identify and place a value for the improvements located on each property. Lot A-16 and A-18 each have a mobile home and a shed on them. Sisk believes that the information for the mobile home and shed on Lot A-16 was mistakenly placed on the index card for Lot A-18. She argues that this was important because it shows she did not replace a shed measuring 6’ x 6’ with one measuring 8’ x 10’. This mistake, if it is in fact a mistake, is of no consequence. Sisk was issued a violation notice for the shed that is actually on her lot, not for the shed that is described on the index card for her lot.

### **D. The Initial Decisions Rejecting the Appeal and Application for a Variance**

The Board found that the initial decisions by Berl and Godwin to reject Sisk’s appeal and application for a variance are moot. The Board originally rejected Sisk’s appeal and application for a variance because she did not file the appeal in time and the application for a variance was not accompanied by a survey showing the improvements on her lot.

These decisions are indeed moot because the Board ultimately accepted Sisk's appeal and application for a variance, held a hearing on them, and rendered decisions on them.<sup>9</sup>

### **E. The Chancery Court Action**

The Board found that Sussex County's decision to file an action in the Court of Chancery seeking an order forcing Sisk to remove the shed is not a decision within the meaning of Section 115-208(B) that is appealable to the Board. Sussex County filed a complaint in the Court of Chancery against Sisk seeking the forced removal of the shed. Sussex County's decision to file an action in Chancery Court to force Sisk to remove the shed is not a decision regarding the application of the zoning code. That decision was previously made by the building official when he issued the violation notice to Sisk. The Chancery Court action is nothing more than the legal mechanism by which Sussex County enforces the building official's decision where the violator has refused to correct the violation.

## **II. The Application for a Variance**

The requirements for obtaining a variance are set forth in Sussex County Code Sections 115-211 (A) and (B). Section 115-211(A) provides that the Board shall have the power to grant:

A variation in the yard requirements in any district so as to relieve practical difficulties or particular hardships in cases when and where, by reason of exceptional narrowness, shallowness or other unusual characteristic of size or shape of a specific piece of property at the time of the enactment of such regulation or restriction or by reason of exceptional topographical conditions or other extraordinary situation or condition of such piece of property or by

---

<sup>9</sup> "According to the mootness doctrine, although there may have been a justiciable controversy at the time litigation was commenced, the action will be dismissed if that controversy ceases to exist." *GMC v. New Castle County*, 701 A.2d 819, 823 (Del. 1997).

reason of the use or development of property immediately adjacent thereto, the strict application of each regulation or restriction would result in peculiar and exceptional practical difficulties to or exceptional hardship upon the owner of such property. Such granting of variance shall comply, as nearly as possible, in every respect with the spirit, intent and purpose of this chapter, it being the purpose of this provision to authorize the granting of variation only for reasons of demonstrable and exceptional hardship as distinguished from variations sought by applicants for purposes or reasons of convenience, profit or caprice.

Section 115-211(B) provides that the Board shall not issue a variance unless it finds that:

- 1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not to circumstances or conditions generally created by the provisions of the Zoning Ordinance or code in the neighborhood or district in which the property is located.
- 2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance or code and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
- 3) That such unnecessary hardship has not been created by the appellant.
- 4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located and not substantially or permanently impair the appropriate use or development of adjacent property nor be detrimental to the public welfare.
- 5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

The Board concluded that it could not make a decision on Sisk's application for a variance because without a survey the Board could not determine what Sisk wanted. The

applicant for a variance has the burden of proof.<sup>10</sup> Sisk did not try to persuade the Board that she had satisfied the requirements for a variance. She instead argued that her shed was a non-conforming structure that should be exempt from the current zoning code. Sisk's argument is based on the law applicable to non-conforming structures and the agreement between Sussex County and Sea Air.

A non-conforming structure is a structure that was lawful when the zoning code was adopted, but has since become non-conforming because of a subsequent change to the zoning code.<sup>11</sup> A lawful non-conforming structure may be continued.<sup>12</sup> It can also be repaired or reconstructed if it was destroyed by natural causes and is repaired or reconstructed within one year of being damaged.<sup>13</sup> However, the right to continue, repair or reconstruct a non-conforming structure is dependent upon it having been lawfully constructed in the first place.<sup>14</sup> Sisk's second shed was never a lawful non-conforming structure. She acknowledged that it was built without a building permit. The Sussex County zoning code was enacted on October 15, 1968. It has always required a structure to be constructed with a building permit.<sup>15</sup> Thus, the requirement for a building permit was in

---

<sup>10</sup> *Meyer v. Calloway, et. al.*, 2002 WL 32067547 (Del. Super. Dec. 30, 2002); Sussex Cty. C. § 115-211(B).

<sup>11</sup> *Vivari v. Francis*, 1991 WL 79472, at \*3 (Del. Ch. May 6, 1991).

<sup>12</sup> Sussex Cty. C. § 115-200.

<sup>13</sup> Sussex Cty. C. § 115-199.

<sup>14</sup> *Kirkwood Motors, Inc. v. Board of Adjustment*, 2000 WL 710085 (Del. Super May 16, 2000); 9 *Del.C.* § 6920; Sussex Cty. C. § 115-195.

<sup>15</sup> Sussex Cty. C. § 115-224.

place when Sisk placed the second shed on her lot. Therefore, the second shed was not a lawful non-conforming structure. Replacing an unlawful non-conforming structure with another unlawful non-conforming structure does not cleanse the original unlawfulness. The law of non-conforming structures does not help Sisk.

Similarly, the agreement between Sussex County and Sea Air does not help Sisk. This agreement does two things. One, it provided that all non-conforming structures in Sea Air as of 2007 would be allowed to remain without being violated. Two, it provided that after 2007 both the replacement of an existing non-conforming structure and the construction of a new structure would have to be done in accordance with the zoning code. This agreement allowed Sisk's second shed to remain and not be violated even though it was built without a building permit and in violation of the building setback and separation requirements. However, the agreement required that a replacement shed for the second shed would have to conform to the existing zoning code, meaning that Sisk had to get a building permit for her current shed and place it on her lot in accordance with the building setback and separation requirements. Sisk did not do what the agreement required.

Sisk also argues that the "rules, conditions and restrictions" that Sussex County placed on the filing of her variance application are excessive, arbitrary and capricious and unreasonably interfered with her right to seek timely redress. I assume that Sisk is referring to Sussex County's requirement that she had to obtain Sea Air's approval for the shed and submit a survey with her application for a variance. Sisk's arguments are misplaced. The Board considered Sisk's application for a variance even though she did not obtain Sea Air's approval for the shed or submit a survey. The Board concluded that it could not render an informed decision on Sisk's application for a variance without

knowing the location of the shed, the property lines, the rear-yard and side-yard setback lines, and the location of the other structures on Sisk's lot. This is very different than just summarily denying Sisk's application for a variance. The Board's decision is in accordance with the applicable law. In order to obtain a variance, Sisk had to show that "by reason of exceptional narrowness, shallowness or other unusual characteristic of size or shape" of her lot that the application of the requirements of the zoning code would result in "exceptional practical difficulties" or "exceptional hardship" upon her.<sup>16</sup> Sisk also had to describe the variance she wanted and the variance had to be the minimum variance necessary.<sup>17</sup> A survey would have been the only way to realistically meet these requirements. However, it does not matter because Sisk never asked for a specific variance or tried to persuade the Board that she was entitled to a variance. As I noted previously, Sisk based her case on her belief that her shed would be treated as the replacement of a lawful non-conforming structure. Her belief about this, as I discussed previously, was not correct. Quite simply, Sisk failed to prove that she met the requirements for a variance.

### **CONCLUSION**

The Sussex County Board of Adjustment's decisions are AFFIRMED.

**IT IS SO ORDERED.**

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

---

<sup>16</sup> Sussex Cty. C. § 115-211.

<sup>17</sup> Sussex Cty. C. § 115-211(C).